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SERVICE DATE – MARCH 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42144

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL &
PETROCHEMICALS MANUFACTURERS; THE CHLORINE INSTITUTE;
THE FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL;
ETHANOL PRODUCTS, LLC D/B/A POET ETHANOL PRODUCTS;
POET NUTRITION, INC.; AND CARGILL INCORPORATED

v.

UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42150

VALERO MARKETING AND SUPPLY COMPANY
AND VALERO RAIL PARTNERS, LLC

v.

UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42152

TESORO REFINING & MARKETING COMPANY LLC;
TESORO GREAT PLAINS GATHERING & MARKETING, LLC;
AND DAKOTA PRAIRIE REFINING, LLC

v.

UNION PACIFIC RAILROAD COMPANY

Digest:¹ This decision grants a motion filed by Union Pacific Railroad Company to consolidate three complaint proceedings, and denies motions by two complainants to hold their complaint proceedings in abeyance.

Decided: March 29, 2017

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

On June 2, 2015, North America Freight Car Association, American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, Inc., The Fertilizer Institute, American Chemistry Council, Ethanol Products, LLC d/b/a POET Ethanol Products, POET Nutrition, Inc., and Cargill Incorporated (collectively, NAFCA Complainants) filed an amended complaint in Docket No. NOR 42144 against Union Pacific Railroad Company (UP) pursuant to 49 U.S.C. §§ 10702, 11101, 11121, 11122, 11701, and 11704, and 49 C.F.R. pt. 1111. In Count I, NAFCA Complainants challenge the reasonableness of UP Tariff 6004, Item 55-C (Item 55-C), which became effective on January 1, 2015. NAFCA Complainants allege that Item 55-C “shifts the costs of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars, including [NAFCA Complainants], without compensating them for UP’s use of their cars.” (Am. Compl. 6, June 2, 2015.) NAFCA Complainants assert that Item 55-C “is (a) an unreasonable practice in violation of 49 U.S.C. § 10702, and (b) a violation of UP’s statutory obligation to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b).” (*Id.* at 8.) In Count II, NAFCA Complainants allege that “UP’s refusal to compensate [NAFCA Complainants] for such use, whether through mileage allowances or reduced line haul rates, constitutes an unreasonable practice under 49 U.S.C. § 10702, and is a violation of 49 U.S.C. §§ 11101, 11121, and 11122.” (*Id.* at 9.) On June 22, 2015, UP filed its answer to the amended complaint.

On June 22, 2015, UP moved to dismiss the amended complaint or make that complaint more definite. By decision served on December 21, 2015, the Board denied UP’s motion and directed the parties to submit a proposed procedural schedule. On February 11, 2016, the Board referred all discovery issues to Administrative Law Judge John P. Dring.² On June 10, 2016, the Board granted UP’s motion to hold the procedural schedule in abeyance pending the resolution of discovery disputes and further order of the Board.

On December 19, 2016, Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, Valero) filed a complaint against UP in Docket No. NOR 42150, raising substantially the same allegations as Count I of the NAFCA Complainants’ amended complaint, described above. On December 30, 2016, Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing, LLC, and Dakota Prairie Refining, LLC (collectively, Tesoro) filed a complaint against UP in Docket No. NOR 42152, also raising substantially the same allegations as Count I of the NAFCA Complainants’ amended complaint.

On January 6, 2017, Valero and Tesoro both filed motions to hold their respective proceedings in abeyance pending resolution of the NAFCA complaint in Docket No. NOR 42144. On January 26, 2017, UP filed replies in opposition to Valero’s and Tesoro’s

² The Board signed a Memorandum of Understanding with the Federal Energy Regulatory Commission (FERC) to employ the services of FERC administrative law judges on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes between parties in cases pending before the Board.

abeyance motions. Also on January 26, 2017, UP filed a motion to consolidate the NAFCAs, Valero, and Tesoro complaint proceedings.

On February 7, 2017, NAFCAs Complainants filed a status report and request to reestablish the procedural schedule in Docket No. NOR 42144. On the same day, NAFCAs Complainants filed a request asking Judge Dring to establish end dates for discovery. On February 15, 2017, NAFCAs Complainants, Valero, and Tesoro filed replies in opposition to UP's motion to consolidate the three proceedings. On February 22, 2017, UP filed a reply in opposition to NAFCAs Complainants' request to reestablish the procedural schedule, as well as a reply in opposition to the request that NAFCAs Complainants submitted to Judge Dring. On February 24, 2017, UP filed motions to compel Valero and Tesoro to respond to UP's discovery requests. By decision served on March 3, 2017, Judge Dring denied NAFCAs Complainants' request to set end dates for discovery and directed the parties to file a bi-weekly status report regarding discovery. Finally, on March 16, 2017, Valero and Tesoro submitted replies in opposition to UP's motions to compel.

DISCUSSION AND CONCLUSIONS

Based on the parties' motions, the Board is presented with three options: 1) consolidate all three proceedings (as requested by UP), 2) do not consolidate the proceedings, but hold the Valero and Tesoro complaint proceedings in abeyance until the Board reaches a decision in the NAFCAs case (as requested by Valero and Tesoro, and supported by NAFCAs Complainants), or 3) do not consolidate and do not hold the Valero and Tesoro proceedings in abeyance.

In deciding whether to grant a request for consolidation, the Board considers whether the proceedings involve common facts, issues, and parties; whether consolidation would promote efficiency; and whether consolidation would unduly delay the proceedings or prejudice any party. See, e.g., Honey Creek R.R.—Pet. for Declaratory Order, FD 34869, slip op. at 3 (STB served June 4, 2008). In deciding whether to hold a proceeding in abeyance, the Board considers whether abeyance would promote efficiency and whether it would be fundamentally unfair to any party. See, e.g., Pet. of Nat'l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048, slip op. at 4 (STB served Oct. 3, 2016). The Board has broad discretion to determine whether to take such procedural actions, and its decision to do so in any particular situation is highly dependent on the facts and circumstances of the case. See id. at 4.

Here, there are arguments both for and against consolidating and for and against holding the Tesoro and Valero cases in abeyance. After weighing these advantages and disadvantages, the Board has determined that, in its discretion, the better course of action is to consolidate and not hold the Tesoro and Valero cases in abeyance. First, UP correctly identifies common facts, issues, and parties among the three dockets. (See UP Mot. 13, Jan. 26, 2017, NOR 42144). Although NAFCAs Complainants argue that Valero's and Tesoro's complaints are distinguishable from NAFCAs Complainants' because Valero and Tesoro only allege Count I (NAFCAs Complainants Reply 7, Feb. 15, 2017, NOR 42144), this is not a significant distinguishing factor given how much the two counts overlap. The broad question presented by Count II—whether UP's alleged failure to compensate private car owners for the use of their tank cars is lawful—

underlies much of the Count I claim presented by Valero and Tesoro as well as NAFCA Complainants.³

Second, UP identifies a significant potential efficiency that consolidation would promote regarding interactions between these closely related cases. (See UP Mot. 13-14, Jan. 26, 2017, NOR 42144). If the Board were to resolve the NAFCA docket first, and then discovery in the Valero or Tesoro dockets pointed toward a different resolution than that reached in NAFCA, it would be very inefficient for the Board to have to revisit or qualify the NAFCA decision at that point. We agree that consolidation would avoid this significant inefficiency in these cases and that avoiding this risk outweighs the possible delay resulting from consolidation.

Finally, on the issue of undue delay or prejudice, the Board recognizes the concern of NAFCA Complainants that consolidation may delay their proceeding. The NAFCA case is still in discovery, and the parties disagree as to how long discovery is likely to continue.⁴ NAFCA Complainants claim that discovery is nearing an end, while discovery in Tesoro and Valero would just be starting. Conversely, UP claims that discovery in the NAFCA case is far from complete. Although it is difficult to gauge exactly how much longer it will take, the record indicates that there are still a number of outstanding discovery items. (UP Status Report 2-3, Mar. 16, 2017; NAFCA Complainants Status Report 2-3, Mar. 16, 2017.) Indeed, Judge Dring, who is more intimately familiar with the tasks needed to complete discovery, found in his March 3, 2017 decision that NAFCA Complainants' recent request to set an end date was premature.

Nonetheless, due to our concerns about that possible delay, we emphasize that discovery involving Valero and Tesoro should proceed as quickly as possible to avoid or minimize any

³ See, e.g., Valero & Tesoro Compls., Dec. 19 & Dec. 30, 2016, NOR 42150 & NOR 42152, ¶ 8 (alleging lack of compensation), ¶ 9 (“The lack of compensation for UP’s use of private tank cars is exacerbated by UP’s adoption of Tariff UP 6004 . . . , which shifts the cost of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars, including Complainants, without compensating them for UP’s use of their cars . . . UP has not implemented measures to ensure that the parties providing it with tank cars are compensated for this additional expense associated with UP’s use of their tank cars”), ¶ 19 (“The publication of UP Tariff 6004, Item 55-C, was not accompanied by any measures to compensate Complainants for the use of their tank cars, including UP’s repair facility transportation charges”), ¶ 21 (“UP’s implementation of the January 1, 2015, modification to Tariff 6004, Item 55-C . . . [is] a violation of UP’s statutory obligations to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b)”).

⁴ See NAFCA Complainants Reply 4, Feb. 15, 2017, NOR 42144 (discovery is nearly complete, and NAFCA Complainants have asked Judge Dring to establish end dates for discovery); UP Reply to Procedural Schedule Request 2-4, Feb. 22, 2017, NOR 42144 (individual complainants have not completed document production, depositions have been noticed but not yet scheduled, and third-party discovery involving tank car owners continues); see also Judge Dring’s March 3, 2017 order denying NAFCA Complainants’ request to set end dates for discovery.

timing effects on the NAFCA case. Because the Valero and Tesoro complaints will be combined with the NAFCA docket, any discovery disputes will be heard by Judge Dring, who is already familiar with the issues, allowing more efficient decisionmaking on disputes that may arise. Although Judge Dring’s prior decisions are not binding on Valero and Tesoro because they were non-parties at the time, these decisions may be instructive in the event there are similar disputes. Moreover, we expect that UP, which is a party to the NAFCA complaint, will not relitigate issues that were resolved in those prior decisions. (See UP Mot. 14, Jan. 26, 2017, NOR 42144 (discovery involving Valero and Tesoro would be expedited because of the framework established by UP, NAFCA Complainants, and Judge Dring, and UP “has no intention of relitigating these issues”).) Also, in his March 3, 2017 decision, Judge Dring ordered the parties to submit a bi-weekly status report on discovery progress. Now that the dockets will be consolidated, it is likely that these reports to Judge Dring will include discovery progress for Valero and Tesoro, which should help to identify and quickly resolve any discovery issues involving Valero or Tesoro.

Although discovery is ongoing, we will now establish a procedural schedule for the consolidated case, which will run from the date discovery is completed. Establishing a procedural schedule now will allow the record to develop in these consolidated proceedings immediately upon completion of discovery, without the need for an additional Board decision. We will establish the following procedural schedule for the consolidated case:

Day 0	Completion of Discovery
Day + 30	Complainants’ Opening Evidence and Argument
Day + 90	UP’s Reply Evidence and Argument
Day + 120	Complainants’ Rebuttal Evidence and Argument ⁵

The parties will be directed to submit a joint status report to the Board when discovery is completed. This includes discovery involving Valero and Tesoro, as well as non-complainant tank car owners in the NAFCA proceeding. (See UP Mot. 7-8, Ex. C, Ex. D, Jan. 26, 2017, NOR 42144; UP Reply to Procedural Schedule Request 4, Feb. 22, 2017, NOR 42144.)

Because the Board is granting UP’s motion to consolidate, the abeyance motions filed by Valero and Tesoro—which were premised on the Board deciding NAFCA first—will be denied.

⁵ The intervals between pleadings that we adopt here are consistent with those proposed by NAFCA Complainants in their request for reestablishment of the procedural schedule (see NAFCA Complainants Procedural Schedule Request 4, Feb. 7, 2017) and those that were originally agreed upon by NAFCA Complainants and UP and adopted in the Board’s February 11, 2016 decision.

Finally, UP's motions to compel in Docket Nos. NOR 42150 and NOR 42152 will be denied as moot. Because the dockets will be consolidated, discovery involving Valero and Tesoro will proceed immediately.

It is ordered:

1. UP's motion to consolidate is granted.
2. Valero's and Tesoro's motions to hold in abeyance Docket Nos. NOR 42150 and NOR 42152, respectively, are denied.
3. The procedural schedule for the consolidated case is established, as set forth above.
4. The parties are directed to submit a joint status report when discovery is completed.
5. UP's motions to compel in Docket Nos. NOR 42150 and NOR 42152 are denied as moot.
6. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.